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10 BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD
11 STATE OF CALIFORNIA
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15 **WRITTEN ARGUMENT IN RESPONSE TO THE ALRB'S**
16 **NOTICE OF OPPORTUNITY TO PROVIDE WRITTEN AND ORAL ARGUMENT**
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I.
INTRODUCTION

This paper is in response to the June 18 and July 13, 2004 (revised) Notice of Opportunity to Provide Written and Oral Augment recently issued by the Agricultural Labor Relations Board ("ALRB"). The ALRB's Notice stated in pertinent part that any person may submit written and/or oral argument in response to the following questions:

1. What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

2. Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

3. Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?

Recipients of the Notice were invited to forward written submissions to the Executive Secretary of the ALRB, postmarked no later than August 2, 2004. In response to this solicitation, Littler Mendelson presents the following written arguments.

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II.
ARGUMENT

A. **Existing Standards Are Virtually The Same Under The ALRA And The NLRA Regarding The Level Of Unlawful Employer Assistance, Short Of Instigation, That Warrant Dismissing A Decertification Petition And Setting Aside Any Subsequent Election.**

1. **Decisions Under the ALRA.**

In the limited number of ALRB decisions on this subject, the ALRB has relied heavily on NLRB, U.S. Court of Appeals, and U.S. Supreme Court precedent. Thus, during a

1 decertification election campaign, an employer is free to communicate to his employees any of
2 his general views about unionism or any of his specific views about a particular union so long as
3 the communications do not contain a "threat of reprisal . . . or promise of benefit." (*Limoneira*
4 *Company* (1987) 13 ALRB No. 13 at p. 5, citing *NLRB v. Gissel Packing Co.* (1969) 395 U.S.
5 575; Cal. Lab. Code § 1155). In this regard, the *Limoneira* Board expressly rejected the concept
6 of employer neutrality in a decertification election campaign as follows:

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8 To the extent that our concurring colleague proposes a concept of
9 employer neutrality that would deprive employees of the right to
10 hear all sides of a representation question, we vigorously disagree.
11 Whether in an initial certification, a rival, or a decertification
12 election, "the effective silencing of one source of information
13 would be a clear disservice to employees faced with the need of
14 making an informed choice." [Citation omitted.]

15 13 ALRB No. 13 at p. 5, n. 5.

16 The ALRB distinguished between an employer *instigating* a decertification
17 election and rendering *unlawful assistance* in a decertification effort in *Abatti Farms, Inc.* (1981)
18 7 ALRB No. 36 at p. 4. Relying heavily on NLRB and U.S. Court of Appeals precedent, the
19 ALRB stated that *instigating* a decertification petition essentially requires evidence establishing
20 that the employer implanted the idea of decertification in the minds of the petitioners (*Id.*). The
21 *Abatti* Board concluded that the evidence fell short of that standard (*Id.*). Notably, the *Abatti*
22 Board concluded that even assuming the employer told the petitioner about the decertification
23 procedure, it would not be an unfair labor practice unless the employer initiated the idea for the
24 decertification campaign (7 ALRB No. 36 at p. 4, n. 5 (NLRB citation omitted)).

25 On the other hand, the *Abatti* Board concluded that the following facts amply
26 demonstrated the employer's *unlawful assistance* to the employees in their decertification efforts:
27 (1) the petitioner was allowed an extended absence from work in order to circulate the petitions;
28 (2) petitioner received a Christmas bonus well in excess of (four times) any bonus received by the
other tractor drivers; (3) the employer allowed petitioner to charge to the employer's account the
repair of a broken window on his car, and then waited to deduct the cost from his paycheck for
about four months until shortly before the hearing; (4) petitioner retained his eligibility for health

1 insurance even though he did not work enough hours during the month he was circulating the
2 petition to entitle him to coverage; (5) in contrast, another employee was treated quite differently
3 when leave was requested to conduct union business; (6) the employer made arrangements which
4 resulted in the petitioner being represented by counsel; and (7) the employer's field foremen
5 assembled the employees for the purpose of obtaining signatures on the petitions (7 ALRB No. 26
6 at 5-7).

7 It is also important to note, however, that despite the above-stated facts, the *Abatti*
8 Board, relying on NLRB precedent, confirmed that the ALRA cannot require an employer to
9 refuse to respond to employee inquiry. Specifically, if asked by an employee, an employer could
10 name or suggest a lawyer whom the employee might consult (7 ALRB No. 36 at p. 7). In *Abatti*,
11 however, the evidence showed that the employer went well beyond merely naming or suggesting
12 a lawyer whom the petitioner might consult; rather, the employer brought the petitioner and
13 counsel together (see 7 ALRB No. 36 at p. 7, n. 8).

14 The underlying Administrative Law Officer's analysis in *Abatti*, not contradicted
15 by the ALRB's decision, reasoned as follows with regard to the "unlawful assistance" issue:

16 To be unlawful the employer's conduct must go beyond simple,
17 innocuous assistance to employees seeking to decertify a union.
18 [NLRB citations omitted]. The employer's conduct must
19 affirmatively encourage or promote the employees to engage in a
20 decertification effort, or the employer must give active assistance
and support to such a decertification effort, before the employer's
conduct becomes unlawful. [NLRB and U.S. Court of Appeals
citations omitted].

21 7 ALRB No. 36, ALO decision at p. 49.

22 The nub of *Abatti* would seem to be that if an employee asks an employer how to
23 decertify a union or asks for the name of an attorney he or she could consult, an employer has a
24 perfect right to answer the inquiry.

25 *Peter D. Solomon, et al.* (1983) 9 ALRB No. 65, really goes beyond the subject set
26 by the ALRB for briefing, because in *Solomon* the ALRB concluded that the employer *instigated*
27 the decertification efforts of its employees. Thus, the impetus for the decertification movement
28 clearly came from the employer in *Solomon* and the employer's attorney (9 ALRB No. 65 at p.4-

1 5). Thus, in *Solomon*, the employees had not requested any assistance or advice of any kind, and
2 the decertification movement did not take hold and move forward until the employer brought the
3 dissatisfied workers together and organized them (*Id.*). The employer's conduct in arranging for
4 free legal representation (provided *pro bono*) was seen by the ALRB as going beyond a
5 *ministerial act* and therefore constituted unlawful assistance (9 ALRB No. 65 at p. 7).¹

6 Here again, however, the *Solomon* Board expressly stressed that an employer does
7 not violate the ALRA by responding to employees' questions or inquiries concerning their rights,
8 including the right to decertify, or by referring employees to someone they can consult about their
9 rights. As the ALRB stated, "Employees are entitled to receive information about their rights
10 from whatever source; any other result would be contrary to the purposes of the Act [citation
11 omitted]." (9 ALRB No. 65 at 7-8).

12 In the context of *lawful or unlawful assistance*, the ALRB has concluded in
13 multiple decisions that an employer does not violate the ALRA simply by allowing employees to
14 circulate a decertification petition and to discuss decertification on company time. In *TNH*
15 *Farms, Inc.* (1984) 10 ALRB No. 37, the ALRB affirmed the Investigative Hearing Examiner's
16 findings and conclusions, accepted his recommended decision, and certified the decertification of
17 representative. IHE Goldberg in his underlying decision concluded as follows: "Merely
18 permitting the circulation of the petition on company time or allowing employees to discuss,
19 during working hours, getting rid of the Union has been held insufficient to support a finding of
20 active employer instigation of or participation and assistance in a decertification campaign
21 [citations omitted]." (10 ALRB No. 37, IHE decision at p. 20).

22 Similarly, in *Nash De Camp Company* (1999) 25 ALRB No. 7, the ALRB, in
23 affirming the partial dismissal of the union's election objections, stated, "... the declarations
24 simply indicate that a checker and a weigher were seen soliciting signatures on company time. It
25 is not objectionable for an employer to simply allow employees to circulate a decertification
26 petition on company time. [Citing *TNH Farms, Inc., supra*]." (25 ALRB No. 7, at p. 4).

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28 ¹ However simply suggesting a lawyer whom the employees could consult would have been OK (*Id.*).

1 Furthermore, in the accompanying Notice of Partial Dismissal of Objections by the ALRB's
2 Executive Secretary at page 3 thereof, the Executive Secretary stated:

3 Low level supervisory solicitation of authorizations will generally
4 not warrant a finding of supervisory "taint" that would be imputable
5 to the employer. (See, *Admiral Petroleum Corp.* (1979) 240 NLRB
6 894; *Willett Motor Coach Co.* (1977) 227 NLRB 882).

7 Although the ALRB did not expressly adopt this reasoning, the dismissal of the
8 objection was affirmed as discussed above.

9 In *Mayfair Packing Co.* (1987) 13 ALRB No. 20, the ALRB affirmed
10 Administrative Law Judge Sobel's findings and conclusions, based on credibility resolutions, that
11 the employer therein did not initiate or assist the decertification petition. *Mayfair Packing* is not
12 really helpful to the present review because the allegations of employer instigation and unlawful
13 assistance were totally discredited and found not to be true by the Administrative Law Judge,
14 which was affirmed by the ALRB. The ALJ's discussions in *Mayfair Packing*, however, present
15 some potentially relevant scenarios. Thus, the fact that a newly hired employee (Martinez)
16 became instrumental or a catalyst in leading a decertification effort did not mean that he was
17 hired to sow dissension in the workforce or otherwise to start a decertification campaign because a
18 number of other workers already were complaining that the union did not represent them. In
19 other words, the workforce already was divided and there was considerable worker unrest before
20 the individual's hire (13 ALRB No. 20, ALJ decision at 49-52).

21 Also of interest, the ALJ's decision in *Mayfair Packing*, affirmed by the ALRB,
22 continued to confirm the proposition that there was nothing wrong with decertification petitioners
23 obtaining signatures on the decertification petition on work time, citing *Jack or Marion Radovich*
24 (1983) 9 ALRB No. 45 (13 ALRB No. 20, ALJ decision at p. 56, n. 69). However, the ALJ
25 commented that if the petitioners had spent 2-3 hours a day soliciting signatures, as alleged by the
26 discredited witness, an inference of employer support [assistance] could be made (*Id.*).

27 In the Administrative Law Judge's decision in *Radovich, supra*, relying on NLRB
28 and U.S. Court of Appeals precedent, the Administrative Law Judge concluded that there was no
evidence that the employer *instigated* the decertification campaign (9 ALRB No. 45, ALJ

1 decision at 43-52). Again, citing NLRB and U.S. Court of Appeals decisions, the ALJ
2 specifically rejected the General Counsel's theory that the employer had a duty to prevent
3 circulation of decertification petitions on company time, and specifically confirmed the
4 employees' right to circulate a decertification petition on company time (9 ALRB No. 45, ALJ
5 decision at 53-57). Thus, where an employer has not inspired or fostered the decertification
6 petition, but may simply be aware that a petition was being circulated, no *unlawful assistance* is
7 found (*Id.*).

8 The ALRB affirmed the ALJ's findings and conclusions on these matters in
9 *Radovich, supra*. The issues in *Radovich, supra*, however, also involved employer campaign
10 statements during the election campaign after the decertification petition was filed. In a speech to
11 assembled workers and in a leaflet handed out in conjunction with the speech, the employer in
12 *Radovich, supra* accused the union of telling lies and making false promises, compared the
13 benefits in effect at non-union ranches to union contract benefits, stated that the employer's
14 employees were receiving lower wages and benefits than the employees at non-union farms
15 because the union would not agree to offers made by the employer, and claimed that the union
16 was considering raising the amount of its membership dues (9 ALRB No. 45 at p. 2-3). The
17 ALRB affirmed the ALJ's findings that the speeches and leaflet did not constitute *unlawful*
18 *assistance* to the decertification campaign (*Id.*).

19 In certifying the decertification election results in *Radovich*, however, the ALRB
20 provided a more extensive examination of the speech involved. Citing NLRB and U.S. Supreme
21 Court precedent, the ALRB confirmed that an employer was free to express its opinion during a
22 decertification election campaign, as long as such speech did not include threats of force or
23 reprisals or promises of benefits, and as long as it did not constitute direct negotiations with the
24 represented employees (9 ALRB No. 45 at p. 4-7). In that regard, the ALRB stated that "...we
25 shall not set aside an election on the tenuous possibility that a comparison of existing benefits
26 such as the one herein might be perceived by potential voters as an implicit promise to pay them
27 more favorable benefits if they vote against the Union. We find that the employees' interest in
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1 full disclosure and maximum information concerning the advantages and disadvantages of
2 unionization outweighs any arguable or possible coercive effect of the statements.” (9 ALRB No.
3 45 at p. 6). Thus, under the ALRA, employer comparison of existing benefits between union and
4 non-union shops generally is not unlawful, even when the unionized employer cites better
5 benefits available at his own non-union shops, absent a more explicit inducement to the voting
6 employees (9 ALRB No. 45 at p. 5-6).

7 In *Radovich, supra*, the ALRB concluded that although an employer’s
8 campaigning during a decertification election could amount to conduct inconsistent with its duty
9 to bargain with the certified representative, the ALRB again rejected any suggestion that it should
10 establish a total prohibition against any employer speech or conduct in decertification drives (9
11 ALRB No. 45 at p. 8-9). As the ALRB confirmed,

12 Employer statements, views, and arguments are just as relevant in
13 the decertification context as they are in the organizational context
14 because they pertain to the same question concerning representation
15 that exists in both kinds of elections, viz: Do employees want a
16 collective bargaining representative? Employees are entitled to
17 receive information relevant to their decision to vote regardless of
18 whether the information comes from the union, the employer, or
19 third parties, so long as it is not coercive or otherwise unlawful, so
20 that they can make an informed as well as a free choice.

21 (9 ALRB No. 45 at p. 9).

22 The ALRB agreed with the Administrative Law Judge that it is the free choice of
23 employees, not the union’s survival that is it at issue in a decertification election. (9 ALRB No.
24 45 at p. 10).

25 Accordingly, in *Radovich, supra*, the ALRB again confirmed that an employer was
26 allowed to answer employees’ questions or requests for information, as long as the responses did
27 not constitute promises of benefits or threats of reprisal. (9 ALRB No. 45 at p. 9-10).

28 In *Nick Canata* (1983) 9 ALRB No. 8, the decertification petitioner, who was at
most a leadperson, was found to be an *agent* of the employer based on rather unique facts, and as
a result the decertification petition was invalid. Canata was a relatively small grape farmer with
22 employees eligible to vote (9 ALRB No. 8 at p. 2-3). The decertification petitioner was the

1 foreman's daughter (*Id.*). At an initial employee meeting, it was said that the owner, Nick
2 Canata, had been to the foreman's house the preceding night to see about getting rid of the union.
3 The petitioner announced at the employee meeting that Canata was going to pay the workers for
4 Labor Day, which was the previous Monday and on which no one worked.² The petitioner then
5 explained the decertification process and asked for a show of hands of who was in favor of
6 decertification (9 ALRB No. 8 at p. 3-4). The petitioner advocated at this meeting that the
7 workers should vote against the union, and at some point the petitioner told the employees that
8 the company's medical benefits were better than the UFW's and that the company would extend
9 its medical plan to all employees (9 ALRB No. 8 at p. 9). Similarly, in other discussions with
10 workers, the petitioner apparently told the workers that the company's offer of \$4.45 per hour in
11 negotiations was reasonable, and that the company could not pay more as it was a small farmer
12 (*Id.*). Thus, the petitioner was found to be serving as a conduit for the company's information
13 and instructions to the employees. The petitioner also had special privileges, and had told people
14 that the company "wasn't supposed to know what was going on." (9 ALRB No. 8 at p. 10). In
15 addition, although she was a bargaining unit member, the petitioner helped the company with its
16 bookkeeping and payroll sheets each week so that she was paid at a slighter higher rate than the
17 other employees. Moreover, during a 3-month period of each year when male and female
18 employees worked apart from each other doing different jobs, employee testimony reflected that
19 the petitioner acted like a forelady for the women's crew.

20 As a result of these rather unique facts, the petitioner in *Nick Canata* was deemed
21 to have "special status" among the employees, so that it was reasonable for the employees to
22 believe that the petitioner, in her decertification efforts, was acting on behalf of the company (9
23 ALRB No. 8 at p. 9). The ALRB's conclusion in this regard was based on the totality of the
24 foregoing facts (her status as daughter of the foreman; her higher wage which was known to other
25 employees and not negotiated with the union; her unique job as payroll assistant; the fact that she
26 served as a conduit for the company's information and instructions to the employees, as in
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28 ² The workers received this pay in their next paycheck.

1 announcing the Labor Day pay; and that she appeared to be privy to inside information, as
2 evidenced by her discussions with the employees concerning how much the company could
3 afford to offer in negotiations) (9 ALRB No. 8 at p. 9-10).

4 Based on the totality of these facts, the ALRB concluded that the decertification
5 petitioner's conduct in the decertification drive was attributable to the company. As a result, the
6 company in *Nick Canata* gave *unlawful assistance* to the decertification effort (9 ALRB No. 8 at
7 p. 10).³

8 In *S&J Ranch, Inc.* (1992) 18 ALRB No. 2, the ALRB concluded that the
9 employer unlawfully *instigated* and supported the signing of a decertification petition. Thus, *S&J*
10 *Ranch, Inc.* really is inapposite to the issue of *unlawful assistance*. In *S&J Ranch, Inc.*, a crew
11 boss who was deemed to be an *agent* of the employer (but not a supervisor) circulated the
12 decertification petition openly in the fields during working hours. The ALRB concluded that this
13 and other facts made it appear that his efforts had the employer's blessing (18 ALRB No. 2 at p.
14 7). Quite frankly, circulation of a petition in the field, by itself, is not determinative and is even
15 allowed under ALRB case precedent (see, *TNH Farms, Inc.*, *supra*, *Nash De Camp Company*,
16 *supra*, *Mayfair Packing*, *supra*). In addition in *S & J Ranch, Inc.*, however, labor consultants
17 employed by the employer encouraged the signing of the decertification petition, which
18 specifically supported the conclusion that the crew boss' circulation of the petition had the
19 employer's blessing. Under the circumstances, the ALRB concluded that the crew boss'
20 decertification efforts would reasonably be perceived by employees as having the employer's
21 imprimatur (*Id.*). Accordingly, the decertification petition was found to have been unlawfully
22 instigated and supported by the employer in *S&J Ranch, Inc.*

23 As can be seen from these ALRB decisions, the ALRB has relied heavily on
24 NLRB, U.S. Court of Appeals, and U.S. Supreme Court case decisions. Thus, the following
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26 ³ The ALRB expressly concluded that the decertification petition was invalid because it was filed by an agent of the
27 company, citing *Clyde J. Merris* (1948) 77 NLRB 1375, and *Modern Hard Chrome* (1959) 124 NLRB 1235 (9
28 ALRB No. 8 at p. 12). However, in each of those cited NLRB cases, the issue was whether a statutory supervisor
had filed the decertification petition. In *Merris*, the answer was "yes". In *Modern Hard Chrome*, the answer was
"no".

standards apply in ALRB decertification elections:

1. An employer may answer employees' questions, even about how to decertify a union.
2. An employer may recommend an attorney or other person with whom an employee could consult if desired.
3. Employees' circulation of a decertification petition in the field is not unlawful assistance by anybody.
4. During a decertification election campaign, an employer is free to communicate to its employees any of its general views or opinions about unions or the specific union, so long as the communications do not contain a promise of benefit or threat of reprisal or constitute direct negotiations with the employees.
5. In this context, there is nothing wrong with an employer voicing an opinion in favor of decertification or giving speeches during a decertification election campaign.

2. **Decisions Under the NLRA.**

The standard under National Labor Relations Board case law regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election is virtually the same as under the above ALRB decisions. Thus, the NLRB has held that an employer does not commit an unfair labor practice by stating to employees that he had heard they were not satisfied with the union, there was a way they could start a petition through the NLRB, and the company could not help them. Rather, this statement was merely an accurate summary of the law and was permitted by section 8(c) of the NLRA⁴ (*Indiana Cabinet Co.* (1985) 275 NLRB No. 169). Also in *Indiana Cabinet Co.*, two low level "supervisors" (leadmen) signing the petition did not constitute interference because they were members of the bargaining unit and had voted in the certification election.

⁴ Cal. Lab. Code § 1155 is the ALRA parallel to section 8(c) of the NLRA.

1 Likewise, during a decertification campaign under the NLRA, an employer's
2 allowing the petitioner what amounted to greater use of the employer's email system to
3 communicate with the voters, was not unlawful assistance or grounds to set aside the results of
4 the election because the union was given the same opportunity to use the employer's email
5 system, and any disparity in use of the email system was at least to some degree a result of the
6 union's choice to send only one email and rely instead on more traditional methods of
7 communication (*Lockheed Martin Skunk Works* (2000) 331 NLRB No. 104).

8 Similarly, in *Bridgestone/Firestone Inc.* (2001) 335 NLRB No. 75, the employer's
9 assistance to an employee who asked how he "could get out of being in the union," constituted
10 *lawful ministerial aid* in drafting the decertification petition, even though the employer suggested
11 a written petition, where: (1) there was no evidence that the employer induced or influenced the
12 employee's opposition to the union or his desire to get out of the union; (2) the employee initiated
13 contact with the employer; (3) the Administrative Law Judge found that the employee's statement
14 meant that he wanted to be a non-member and to be unrepresented; and (4) the employer had no
15 affirmative duty to inform the employee regarding his obligations toward the union and the range
16 of options available to provide relief from those obligations. Thus, the employer lawfully
17 withdrew recognition from the union by relying on the decertification petition signed by two of
18 the four employees in the bargaining unit, even though the employer assisted the employee in
19 drafting the petition. The petition was not tainted by the employer's *lawful ministerial aid*.

20 The *Bridgestone/Firestone* Board cited in support of this conclusion *Ernst Home*
21 *Centers* (1992) 308 NLRB No. 116. The employer in *Ernst* did not violate the NLRA when, in
22 response to an employee's request, it provided the employee with the language to be used in
23 drafting the decertification petition, where there was no evidence who, if anyone, suggested or
24 encouraged the employee to file the petition. This was found to be *mere ministerial aid* to
25 someone who had already decided to file a decertification petition. Thus, the employer's
26 responding to the employee's request for petition language did not violate the NLRA (citing
27 *Eastern States Optical Co.* (1985) 275 NLRB 371).

1 The amount of assistance that the employer may lawfully provide to the workers'
2 efforts to decertify the union was an issue in *Vic Koenig Chevrolet v. NLRB* (7th Cir. 1997) 126
3 F.3d 947. The reviewing U.S. Court of Appeals determined that the unquestioned standard
4 (regardless of varying NLRB decisions) was that the employer must not, by his assistance to the
5 employees who are seeking to disconnect from the union, interfere with employee free choice.
6 Thus, the question addressed in *Koenig* was whether the assistance or ministerial assistance by the
7 employer interfered with employee free choice. The answer in *Koenig* was "no" because any
8 assistance by the employer was *after* a majority of the employees had expressed their intent or
9 desire to decertify the union. This process involved the employees conducting their own vote on
10 being represented. When the employer's labor attorney saw the results of the vote, he advised the
11 employer that the wording on the petition was incorrect and would need to be revised. The
12 employer relayed this information to the employees, who prepared a new set of petitions with the
13 appropriate wording. The court found that the assistance that the employer rendered to the
14 employees, while not trivial, was not likely to influence the employees' decision about whether to
15 stick with the union. Accordingly, the employer's assistance did not violate the NLRA.

16 Other NLRB decisions illustrate the kinds and levels of assistance that are allowed
17 and that will not invalidate a decertification petition. For example, in *Plastic Molding Corp.*
18 (1955) 112 NLRB No. 35, a working leadman in a maintenance department was the
19 decertification petitioner. The leadman apparently discussed the petition with a supervisor and
20 asked him where to get the petition. The decertification petition was the leadman's idea, and the
21 supervisor answering the employee's questions was not unlawful assistance.

22 As another example, in *Laris Motor Sales, Inc.* (1953) 104 NLRB No. 142, a
23 decertification petition was not dismissed where, one week after the filing of the petition, the
24 employer withdrew from a multi-employer bargaining association, thereby indirectly aiding the
25 petitioner by making possible an appropriate unit within the scope of the decertification petition.

26 Similarly, in *Moore Drop Forging Co.* (1964) 108 NLRB No. 5, the NLRB
27 concluded that the decertification petition was not subject to dismissal on the ground that it was
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1 inspired by the employer's president, where the evidence showed that the petitioner requested the
2 employer's advice with respect to the possibility of rejecting the union as the bargaining
3 representative, and thereafter the employer's president suggested to the petitioner that he contact
4 a particular labor consultant whose name the employer's president had heard in conversations
5 with various state and federal labor officials. In other words, the employer truthfully answered
6 the employee's questions and suggested the employee contact a labor consultant if he was
7 interested.

8 In *Southeast Ohio Egg Producers* (1956) 116 NLRB No. 128, an employer's
9 limited assistance to a petitioning employee at the employee's request did not invalidate the
10 petition. In *Southeast Ohio*, the employee petitioner requested and received information from the
11 employer as to the procedure to be followed in obtaining and filing a petition for decertification.
12 The employer furnished the petitioner with certain information necessary to complete the petition,
13 and the petition and the showing of interest form in support thereof were typed in the employer's
14 office *after* working hours by the petitioner's wife, who admittedly was a supervisor. Employees
15 signed the showing of interest form in the employer's office during working hours in the
16 petitioner's presence. The testimony was uniform that the employer had not suggested the filing
17 of the petition, that the employer had not requested any of the employees to sign the showing of
18 interest form for the petition, and that no representative of the employer (except the petitioner's
19 wife) had been present when the showing of interest form or the decertification petition was
20 drawn up or signed. Furthermore, it was also clear that the only time that the employer had
21 discussed the matter of decertification with the petitioner was when the petitioner took the
22 initiative in requesting information from the employer.

23 In comparison with the above cases, in *Bond Stores, Inc.* (1956) 116 NLRB No.
24 277, the employer not only answered employee questions, but also provided the necessary form
25 and office typing skills *during working hours* on *multiple* occasions, and assistance in preparing
26 the decertification forms. During picketing activity, an impromptu meeting of the employees and
27 the employer's manager and a labor relations counsel took place to discuss the pickets and the
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1 status of contract negotiations. When an employee asked how the employees could get out of the
2 union, the labor relations counsel replied that "There was such a thing as decertification whereby
3 the people would meet under the authority of the National Labor Relations Board" and that the
4 employees "would vote on whether or not they would want to be in a union." Standing alone,
5 that probably would have been OK. A few days later, the petitioner visited the employer's labor
6 counsel where he obtained the decertification form. Here again, handing an employee a
7 decertification form if asked also should have been OK. However, the informal petition to be
8 used as a showing of interest was typed in the office manager's office by the employer's typist on
9 company time and with the knowledge of the office manager. Subsequently, the petitioner took
10 the Board decertification forms to the office manager's office where the typist's services were
11 again used on company time to fill out the forms. The employer's labor relations representative
12 was present in the office at this time and assisted the petitioner in preparing the decertification
13 forms. The NLRB concluded that the employer therein unlawfully intruded upon its employees'
14 rights independently to file a decertification petition with the Board. Because the employer
15 improperly assisted the petitioner in filing the decertification petition, the rights of the employees
16 to file decertification petitions had been abridged, and the petition was dismissed. In other words,
17 the employer in *Bond Stores* provided more than ministerial assistance.

18 Similarly, in *Gold Bond, Inc.* (1954) 107 NLRB No. 221, an employer was found
19 to have unlawfully assisted in the filing of a decertification petition based on the totality of the
20 following facts. Certain employees who were dissatisfied with the union talked on several
21 occasions with the employer's president about the method of decertifying the union. The
22 employer's president thereafter communicated with his attorneys on behalf of the dissatisfied
23 employees. Sometime later, the employer's president permitted and arranged conferences of the
24 dissatisfied employees with the employer's attorneys. On one occasion, four of the fourteen
25 employees in the bargaining unit were permitted to take a day off, without pay, to meet with one
26 of the employer's attorneys at an appointment arranged by the employer's president. At that
27
28

1 meeting, the employees met another attorney who then became the decertification petitioner.⁵
2 Both the employer's attorney and the petitioning attorney, who was a former associate of the
3 employer's attorney, participated in the discussion at that meeting. The employer's attorney
4 called the Board's Regional Office for an appointment for the petitioner and one of the
5 employees. The employer's attorney advised the employees without charge, and was paid by the
6 employer. Clearly, the employer in *Gold Bond, Inc.* went beyond the providing of mere
7 ministerial assistance.

8 In *Consolidated Blenders, Inc.* (1957) 118 NLRB No. 59, the NLRB stated that
9 although the Board has held that certain types of assistance do not necessarily invalidate a
10 decertification petition (citing *Belden Brick Co.*, 114 NLRB 52; *Clackamas Logging Company*,
11 113 NLRB 229), the facts in *Consolidated Blenders* convinced the NLRB that the employer
12 therein had exceeded the bounds of neutrality imposed by the NLRA, and thereby unlawfully
13 intruded upon the employees' rights independently to file a decertification petition. In
14 *Consolidated Blenders*, the employer arranged for its attorney to advise employees as to their
15 rights and decertification proceedings, and the employer's counsel supplied the petitioner with the
16 decertification forms, filed the petition with the NLRB, and recommended another attorney to the
17 petitioner only after the NLRB's hearing officer made it clear that the employer's counsel could
18 not represent both the employer and a decertification petitioner. Moreover, the plant
19 superintendent permitted the decertification petition to be circulated on company time and
20 property, and allowed the petitioner's attorney to interview each employee privately in the plant
21 on company time, while refusing a union representative permission to have access to employees
22 on company property.

23 From these comparative NLRB cases, it continues to be clear that an employer
24 subject to the NLRA does not violate the NLRA in a decertification election under the following
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26 ⁵ The NLRB has held that a decertification petition is not subject to dismissal where it was filed by an attorney
27 representing a petitioning party who was not disclosed (*Abbott Laboratories* (1961) 131 NLRB No. 76). The petition
28 in *Abbott* was filed by an attorney and was administratively investigated by the Regional Director before proceeding
to hearing. The NLRB reasoned that the NLRA permitted the filing of a decertification petition by "any individual,"
and it was not necessary that the petition be filed by any sponsoring employee or committee of employees, as long as
a sufficient showing of interest was administratively demonstrated.

standards:

1. An employer may answer an employee's questions about how to decertify a union or the wording that would be appropriate for such a petition.
2. An employer may recommend an attorney or other person with whom an employee could consult if desired.
3. An employer may provide ministerial assistance such as in the *Bridgestone/Firestone, Inc., supra, Ernst Home Centers, supra, Vic Koenig, supra*, and other cases.
4. During a decertification election campaign, an employer is free to communicate its views or opinions to its employees and to urge its employees to vote against the union, as long as the communications do not contain any threat of reprisal or promise of benefit, or constitute direct negotiations with the employees.
5. During a decertification election campaign, an employer may inform its employees that they will not suffer wage reductions or any loss of benefits if the union is voted out. (*Crown Chevrolet Co.* (1981) 255 NLRB 26; *El Cid, Inc.* (1976) 222 NLRB 1315.

In this regard, the existing ALRB decisions are, and should be, closely parallel with the NLRB decisions.

B. The Factors Listed In *Overnite Transportation Company* (2001) 333 NLRB 1392 Should Apply Only Where There Is An Earlier Unremedied Unfair Labor Practice Charge That Directly Could Have Caused The Employee Decertification Petition.

In *Overnite Transportation Company* (2001) 333 NLRB 1392, employees filed decertification petitions in late 1999 and early 2000 at several service centers which had been organized nationwide in about 1995. In 1995 and 1996, the employer therein engaged in what was later found to be a nationwide campaign of extensive and egregious unfair labor practices, including "hallmark" violations of the NLRA, but which were not the subject of an NLRB decision until November 10, 1999. The NLRB's decision therein subsequently was enforced by

1 the Fourth Circuit Court of Appeals in early 2001.

2 The late 1999 and early 2000 decertification petitions were dismissed by the
3 Regional Directors based on the aforementioned pending unfair labor practice proceedings which
4 included alleged violations of sections 8(a)(1), (3), and (5) of the NLRA. The employer in
5 *Overnite Transportation Company* requested review of the administrative dismissals (which
6 would have occurred in late 1999 or early 2000), and the resulting decision of the NLRB (333
7 NLRB 1392) was dated May 15, 2001.

8 From a simple and straightforward look at the timetable involved in *Overnite*
9 *Transportation Company*, it is crystal clear that the subject decertification petitions were filed
10 immediately before and shortly after the NLRB reached its November 10, 1999 decision on the
11 underlying Overnite unfair labor practice charges, which the employer appealed to the Court of
12 Appeals.

13 As stated above, the Regional Directors dismissed the decertification petitions
14 based on the pending unfair labor practice proceedings (the NLRB decision regarding which was
15 published November 10, 1999, and which Overnite subsequently appealed to the Fourth Circuit
16 U.S. Court of Appeals). The employer in the 1999 decertification matters, argued to the NLRB
17 that the petitions should be processed (and not dismissed) because all of the unfair labor practices
18 cited by the Regional Directors *occurred* in 1996 and 1997, and thus were *remote in time* from
19 the filing of the decertification petitions. Overnite further argued that it had *remedied* all of these
20 outstanding unfair labor practices, so that a free and fair election could be held at that time (1999-
21 2000).

22 The NLRB did not agree. The NLRB generally will dismiss a representation
23 petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint
24 alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and
25 (2) is inherently inconsistent with the petition itself (333 NLRB at 1392-1393). Had there been
26 no concurrent unfair labor practice complaint or proceedings outstanding or pending in *Overnite*
27 *Transportation Company*, there would have been no need for the remainder of the NLRB's
28

1 decision or any factor analysis therein.

2 In a nutshell, the only reason for the NLRB's factor analysis in *Overnite*
3 *Transportation Company* was to determine whether there was a *causal connection* between the
4 unfair labor practices alleged in the earlier complaint (that resulted in the NLRB's November 10,
5 1999 decision) and any subsequent loss of majority support for or employee disaffection with the
6 union (which resulted in the decertification petitions). If there were no pending unfair labor
7 practice cases, there would be no reason to apply the factor analysis. In other words, the factor
8 analysis regarding the existence of any causal connection, as found in *Overnite Transportation*
9 *Company*, is separate and apart from any determination of whether there is *unlawful employer*
10 *assistance* in procuring the showing of interest for a decertification petition.

11 To the extent that the ALRB's Notice of Opportunity to Provide Written and Oral
12 Argument may be asking whether the *Overnite Transportation Company* factors should be
13 applied in determining whether or not any assistance rendered by an employer was unlawful
14 employer assistance, the clear answer should be "no". The straightforward reason for this is
15 stated above and in *Overnite Transportation Company*. The *Overnite Transportation Company*
16 factor analysis was applied to determine whether a causal relationship existed between earlier,
17 unremedied unfair labor practices and the subsequent expression of employee disaffection with an
18 incumbent union. Where there are no earlier, unremedied unfair labor practices, the factor
19 analysis has no application. Rather, the issue is whether any assistance by the employer reaches
20 the level of *unlawful assistance*.

21 C. **NLRB Cases Considering Alleged Unlawful Employer Assistance, In The Context Of**
22 **Withdrawals Of Recognition Or RM Petitions, Should Apply To Unfair Labor**
23 **Practice Proceedings Alleging Unlawful Employer Assistance To An Employee**
24 **Initiated Decertification Petition.**

25 Under the National Labor Relations Act and NLRB case law, employees
26 dissatisfied with their union may: (1) file a decertification petition with the NLRB; or (2) give a
27 similar petition to the employer, and the employer may withdraw recognition of the union or file
28 its own RM petition (*Levitz Furniture Co.* (2001) 333 NLRB No. 105). However, the burden is
on the employer to demonstrate affirmatively that the union *actually has lost* majority support

1 (*Id.*).⁶ Either way, however, the standard is the same and is unchanged regarding whether the
2 employer unlawfully instigated or assisted with the process (see Argument section A, *supra*).

3 In contrast, under the ALRA, employees disaffected with their union
4 representation must file a decertification petition, and there is no such thing as an RM petition or
5 an employer withdrawing recognition of the union as the collective bargaining representative
6 (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 224-226; *M. Caratan, Inc.* (1983) 9 ALRB
7 No. 33). Similarly, there is no such thing as voluntary recognition or even a card check under the
8 ALRA. In other words, the only way a union can attain representation status or lose
9 representation status under the ALRA (short of a disclaimer of interest) is an election (*Id.*; Cal.
10 Lab. Code §§ 1156, 1156.3, 1156.7). Be that as it may, and as detailed in section A of this
11 written argument, none of these legal points alter the standard under the ALRA (and the NLRA)
12 for determining whether an employer has provided unlawful assistance to a decertification
13 petition. That standard under the ALRA and the NLRA, as illustrated by the cases cited in
14 section A of this written argument, remains the same.

15 III. 16 CONCLUSION

17 A. Based on existing ALRB decisions and applicable NLRB case precedent, the
18 following standards apply in ALRB decertification elections:

- 19 1. An employer may answer employees' questions, even about how to
20 decertify a union.
- 21 2. An employer may recommend an attorney or other person with whom an
22 employee could consult if desired.
- 23 3. Employees' circulation of a decertification petition in the field is not
24 unlawful assistance by anybody.
- 25 4. During a decertification election campaign, an employer is free to
26 communicate to its employees any of its general views or opinions about

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28 ⁶ For this reason, *Levitz Furniture, supra*, is seen by many as greatly limiting (if not eliminating) the option of an employer to withdraw recognition from a union.

1 unions or the specific union, so long as the communications do not contain
2 a promise of benefit or threat of reprisal or constitute direct negotiations
3 with the employees.

4
5 5. In this context, there is nothing wrong with an employer voicing an opinion
6 in favor of decertification or giving speeches during a decertification
7 election campaign.

8 6. Moreover, an employer should be able to inform its employees during a
9 decertification election campaign that they will not suffer wage reductions
10 or any loss of benefits if the union is voted out.

11 B. The factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392
12 should apply only where there is an earlier unremedied unfair labor practice charge that directly
13 could have caused the employee decertification petition.

14 C. NLRB cases considering alleged unlawful employer assistance, in the context of
15 withdrawals of recognition or RM petitions, should apply to unfair labor practice proceedings
16 alleging unlawful employer assistance to an employee initiated decertification petition.

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Respectfully submitted,

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